Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-939

DELAWARE STATE COLLEGE, et al.,

Petitioners,

v.

COLUMBUS B. RICKS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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December 17, 1979

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PETITION FOR A WRIT OF CERTIORARI
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The Petitioners* respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 18, 1979.

OPINION BELOW

The Opinion of the Court of Appeals, reported at 605 F.2d 710 (3rd Cir. 1979), appears in the Appendix hereto. The

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*The other Petitioners are as follows: Walton H. Simpson, William H. Davis, William G. Dix, Edward W. Hagemeyer, James C. Hardcastle, Delma Lafferty, James H. Williams, William S. Young, Burt C. Pratt, Luna I. Mishoe, Pierre S. duPont, IV, M. Milford Caldwell, George W. McLaughlin, Romeo C. Henderson, Harriet R. Williams, Arthur E. Bragg, Ora Bunch, Ehsan Helmy, Vera Powell, John R. Price, Herbert Thompson, W. Richard Wynder, Ulysses Washington, and Jane Laskaris. M. Milford Caldwell died on October 27, 1979.

Opinion rendered by the District Court on August 30, 1978 and the Memorandum Opinion rendered by the District Court pursuant to Respondent's Motion for Reconsideration on October 16, 1978 were not reported. These opinions appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on September 18, 1979. This petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the time limitation requirements of 42 U.S.C. §2000e-5(e) were complied with in this matter though no unlawful employment practices were alleged to have occurred within 180 days of the filing of a charge with the Equal Employment Opportunity Commission.

2. Whether the effects of a decision to deny an employee a tenure position can constitute a continuing violation relieving one of the requirements to file a charge of discrimination within 180 days of the decision.

3. Whether, for the purposes of applying the applicable statute of limitations, a cause of action alleging a discriminatory decision to deny tenure accrues at the time such a decision is made and communicated for a claim under 42 U.S.C. §1981.

4. Whether, as an alternative ground for affirming the dismissal of a 42 U.S.C. §1981 action, such an action should be dismissed for failing to state a cognizable claim when the claim is solely based on alleged national origin discrimination.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

Section 2000e-5(e), Page 1241 (1976 Ed.). Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local authority.

A charge under this Section shall be filed within 180 days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charges made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person within 300 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the state or local agency.

United States Code, Title 42:

> Section 1981, Page 1216 (1976 Ed.), Equal Rights Under the Law.
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Respondent, Columbus B. Ricks, a black male Liberian filed an action against the Petitioners, Delaware State College and the individuals, who are officials and employees of the College, claiming employment discrimination on the basis of national origin. Respondent invoked the jurisdiction of the District Court on the basis of 42 U.S.C. §2000e et seq., and 28 U.S.C. §§1331 and 1343(3) and

(4). Respondent was employed by Delaware State College ("the College") from September, 1970 through June, 1975 on a series of one academic year contracts. In February, 1973, he was denied academic tenure but was offered another one year contract. In February 1974, the College's Committee on Promotions and Tenure reviewed the Respondent's status again, and again recommended that Respondent be refused tenure. The College's Board of Trustees met on March 13, 1974 and accepted the Committee's recommendation. Respondent was informed that he had been denied tenure, and in April of 1974, Respondent filed a grievance concerning the decision to deny him tenure with the Educational Policy Committee of the College. In May 1974, this committee conducted a hearing concerning Respondent's grievance. The committee determined that the Respondent's grievance

should be denied and that the decision to deny Respondent tenure should remain unchanged. Respondent has not alleged that the decision of the Educational Policy Committee or the actions of its members pertaining to its decision were in any way discriminatory or unlawful. The decision of the Educational Policy Committee was accepted by the Board of Trustees, and conveyed to Respondent by letter of September 12, 1974.

In June, 1974, the Board of Trustees notified Ricks that on the basis of their decision to deny him tenure and in accordance with the policies of Delaware State College, he would be offered a terminal contract for the school year that ran from September 1, 1974 to June 30, 1975. Respondent accepted this terminal year contract. On April 4, 1975, Respondent filed a charge of employment discrimination with the Equal Employment

Opportunity Commission (EEOC). On June 30, 1975, Respondent's terminal year contract with the College expired.

On July 6, 1977, Respondent received a right to sue letter from the EEOC and filed a six count complaint in the District Court on September 9, 1977. The District Court dismissed all counts as being untimely filed. Respondent appealed only the dismissal of his claims based upon 42 U.S.C. §2000e, et seq., and 42 U.S.C. §1981. The Court of Appeals reversed the District Court dismissals as to both of these claims on the basis that the unlawful employment practice of the Petitioners occurred on June 30, 1975 when Respondent's terminal one year contract expired. The Court of Appeals further held that the duration of the terminal one year contract was a part of the decision to deny tenure with the legal effect that

the decision to deny tenure amounted to a continuing violation of 42 U.S.C. §2000e, et seq. (Title VII) through June 30, 1975. The Court further held that any filing made during this time period from the denial of tenure to June 30, 1975 was timely. See Appendix p. 15a.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION AND APPLICATION OF 42 U.S.C. §2000e-5(e).

Section 2000e-5(e) of Title 42 provides that "a charge under this section shall be filed within 180 days after the alleged unlawful employment practice occurred . . .". The Third Circuit determined that the alleged unlawful denial of tenure did not occur at the time that the decision was made by the College, but rather occurred when his terminal year

contract expired. In so holding, the Third Circuit has determined that an unlawful employment practice occurs not at the time that such action is done, but rather, at the time that the effects of such actions are realized.

This holding is in direct conflict with the holding of the Ninth Circuit in Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979). In an almost identical factual situation, the Ninth Circuit rejected the position that the effects of a decision to deny tenure constitute the time of its occurrence rather than when the decision is actually made. In Abramson, the Court of Appeals was also concerned with a claim of discriminatory action in denying one a tenured position. That claimant, after being advised that tenure had been denied, was offered a terminal one year contract in accordance with the College personnel

policies. In order to bring the College's actions within the scope of Title VII, the Plaintiff claimed that the termination date for the terminal contract constitute time when the denial of tenure occurred.

The Ninth Circuit specifically rejected this argument at page 209 where it stated that:

> In this case, appellant was employed under a series of one-year contracts, none of which at the time of the June, 1971 decision (to deny tenure) extended Appellant's employment to or beyond March 24, 1972. Nevertheless, the University was obligated upon the June, 1971 decision to offer her a terminal year. It could be argued therefore, that, inasmuch as the consequences of the tenure denial extended at least until the expiration of the terminal year, Appellant has a Title VII cause of action. We believe, however, that the Pennsylvania District Courts misdirected their attention. The proper focus is upon the time of the discriminatory acts, not upon time at which the consequences of the acts became most painful. Liability of the Appellees must be premises on discriminatory

> action taken by them on or after March 24, 1972, if the tenure decision was final prior to that date, and no other discriminatory action took place thereafter, Appellant's action was properly dismissed.

Thus, the applicable law as determined by the Ninth Circuit is in direct conflict with the Third Circuit's decision in this matter. Moreover, in the present matter, there are no allegations that the policies or informal procedures of the College take place during the terminal year.* Additionally, Respondent, as noted by the District Court, failed to identify any alleged discriminatory action that took place within a 180 day period prior

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*It was on the basis of this additional allegation that the Ninth Circuit reversed the lower court's granting of summary judgment as there appeared to be material issues of fact in dispute concerning these allegations. This is not the case in the present matter, as there are no such allegations and Respondent admits no actions were unlawfully committed during the 180 days prior to the date of filing a charge with the EEOC. See Appendix p. 28a.

to April 4, 1975 when his Title VII complaint was filed. The conflict between these two decisions is further emphasized by this Court's holding in United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977). In Evans this Court held that an act which is not the subject of a timely filing pursuant to 42 U.S.C. §2000e-5(e) is the legal equivalent of an act done prior to the enactment of Title VII.

Other Courts of Appeals have also rejected the Third Circuit's analysis of determining the occurrence of an unlawful employment practice as of the time that its effects arise rather than at the time that the action is taken. The Eighth Circuit denied relief for the effects of a time-barred discriminatory act in Farris v. Bd. of Ed. of City of St. Louis, 576 F.2d 765 (8th Cir. 1978). The Fifth Circuit has held that practices and actions of an employer which do not occur

within the 180 days immediately prior to the date that the grieved party files his charge with the EEOC are barred as untimely. The Court also rejected the "continuing violation" analysis, Bracamontes v. Amstar Corp., 576 F.2d 61 (5th Cir. 1978). See, also, Martin v. Georgia-Pacific Corporation, 568 F.2d 58 (8th Cir. 1977); Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978); Meyers v. Pennypack Woods Home Ownership Assn., 559 F.2d 894 (3rd Cir. 1977); and Masco v. United Airlines, 574 F.2d 1127 (3rd Cir. 1978).

2. THE DECISION BELOW MISINTERPRETS AND FAILS TO APPLY THE RULE OF THIS COURT AS FORMULATED IN UNITED AIR LINES, INC. V. EVANS, SUPRA, REGARDING 42 U.S.C. §2000e-5(e).

The Third Circuit held that it was not bound by the holding of this Court in United Airlines v. Evans, supra, on the

basis that Evans applies only to situations involving actual terminations and some subsequent action, see, Appendix, p. 14A, 15A. However, there is nothing in this Court's opinion to indicate that the precedential value of Evans is limited only to unlawful terminations rather than other unlawful employment practices deemed to be within the scope of 42 U.S.C. §2000e-2.

Specifically, this Court noted at page 558 that:

> A discriminatory act which has not been made the basis for a timely charge is the legal equivalent of a discriminatory act which occurs before the statute has passed. It may constitute relevant background evidence in a proceeding in which the status of the current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present consequences.

Simply put, the Respondent must show the occurrence of an unlawful employment

practice within 180 days of the date that he filed his charge with the EEOC. Respondent has failed to identify any occurrence that transpired between October 7, 1974 and April 4, 1975 regarding the College's decision to deny Respondent tenure. Thus, that decision, as required by the holding in Evans, which occurred prior to October 7, 1974, serves no legal basis for a Title VII claim.

Additionally, the Third Circuit held that the denial of tenure constituted a continuing violation. However, Evans states that the Respondent must show that a present violation exists. Respondent has not shown the existence of any violation that occurred within 180 days of the date of his filing. Thus, the Third Circuit's analysis and holding erred in disregarding this Court's holding in Evans. This misinterpretation of Evans

and failure to apply it to the present situation justifies the grant of certiorari to review the judgment below.

3. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION AND APPLICATION OF THE APPROPRIATE STATUTE OF LIMITATIONS TO A 42 U.S.C. §1981 ACTION.

Concerning Respondent's 42 U.S.C. §1981 claim, the Third Circuit simply determined that since it would use the June 1975 date for purposes of Title VII, the same date would also be applicable to the §1981 action. Thus, the Third Circuit determined that a cause of action alleging discriminatory practices in the denial of tenure accrues not at the time that those alleged actions are taken and communicated to Respondent but rather, at the time that the employment relationship ceases. This determination by the Third Circuit conflicts with this Court's recent statements

concerning the application of statute of limitations, United States v. Kubrick, Case No. 78-1014, 48 U.S.L.W. 4030 (11-27-79).

In Kubrick, this Court noted that generally a statute of limitations begins to run at the time of injury, and certainly not later than when the person is aware of his injury and its probable cause. Further, this Court cited with approval the case of Urie v. Thompson, 337 U.S. 163 (1949). There, this Court noted that the traditional purposes of statute of limitations required one to take action within a specific period of time after notice of the invasion of one's legal rights. In the present matter, the alleged invasion of Plaintiff's legal rights occurred when the Petitioners allegedly discriminatorily denied Respondent tenure. Thus, the holdings of this Court are in conflict with the Third

Circuit's determination that the act of denying tenure does not cause the statute of limitations to begin on this claim, but rather only when the last effect of that decision has occurred does the statute of limitations begin.

Additionally, the Third Circuit's determination conflicts with the holding in Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979). In Bernard, the Fifth Circuit noted the following in applying the applicable statute of limitations to a §1981 claim at page 1255 where it is stated that:

> Under both Texas and federal law, the relevant date for the purposes of the statute of limitations is the last date on which Defendants improperly harmed Plaintiffs. . . . Recovery is limited to those violations occurring within the two year period* immediately

*The Court determined that the applicable state statute in Bernard for this §1981 action was the Texas two year statute of limitations. It is undisputed in the present matter that the applicable statute of limitations is the general three year statute, 10 Del. C. §8106.

preceding the filing of the complaint or thereafter.

Since there is no allegation that the use of terminal year contracts in the present matter involved discriminatory acts by the Petitioners, the only identifiable discriminatory acts involve the denial of tenure which occurred in June, 1974. Since suit was not filed until September, 1977, a determination of when such an action accrued in accordance with the decisions of this Court and the Fifth Circuit require a finding that this §1981 action is time-barred.

4. THE DECISION BELOW FAILED TO AFFIRM THE TRIAL COURT DISMISSAL OF THE 42 U.S.C. §1981 ACTION ON THE ALTERNATIVE BASIS THAT A CLAIM OF NATIONAL ORIGIN DISCRIMINATION FAILS TO STATE A COGNIZABLE CLAIM UNDER THIS STATUTE.

Petitioners sought the dismissal of the 42 U.S.C. §1981 action in the District

Court on two grounds. Petitioners maintained that this action was barred by the applicable statute of limitations and that it failed to state a cause of action on the basis that an allegation of national origin discrimination is not a cognizable claim for relief under 42 U.S.C. §1981. The dismissal of the §1981 action by the District Court was on the basis that the action was barred by the applicable statute of limitations. See Appendix, Page 36a.

Petitioners further sought the affirmance of the District Court dismissal of this action before the Third Circuit on the basis that it was barred by the applicable statute of limitations and that it did not afford relief for alleged national origin discrimination. The Third Circuit refused to consider the alternative basis that national origin discrimination is not protected by 42 U.S.C.

§1981 for the purpose of affirming the lower court. Such consideration of an alternative basis has been approved by this Court. California Bankers Assn. v. Shultz, 416 U.S. 21, 71 (1974). On the basis of the approval that this Court noted in California Bankers Assn. for upholding and affirming lower court decisions on alternative basis, Petitioners request that this Court determine whether the District Court dismissal of the 1981 action can be affirmed on the basis that this statute does not afford protection for alleged national origin discrimination claims.

The District of Columbia Circuit has held that §1981 does not protect alleged national origin discrimination, Kurlyas v. U.S. Department of Agriculture, 373 F. Supp. 1072 (D.D.C. 1974) aff'd without opinion, 514 F.2d 894 (D.C. Cir. 1975); See, also, Manganares v. Safeway Stores,

Inc., 593 F.2d 968 (10th Cir. 1979); Plummer v. Chicago Journeymen Plumbers, etc., 452 F. Supp. 1127 (N.D. Ill. 1978); Saad v. Burns Inter. Sec. Services, Inc., 456 F. Supp. 33 (D.D.C. 1978). Moreover, as this issue raises a significant and recurring problem concerning the scope of protection afforded by 42 U.S.C. §1981, this Court should decide this issue, as it has not directly decided it to date. Cf. McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273 (1976).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully Submitted,

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December 17, 1979

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NO. _____

DELAWARE STATE COLLEGE, et al.,

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COLUMBUS B. RICKS,

Respondent.

PETITIONERS' APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2565

COLUMBUS B. RICKS,

Appellant

v.

DELAWARE STATE COLLEGE, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

(D.C. Civil No. 77-0342)

Submitted Under Third Circuit Rule 12(6)
July 10, 1979

Before: ADAMS, ROSENN and HIGGINBOTHAM,
Circuit Judges.

(Opinion filed September 18, 1979)

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OPINION OF THE COURT

A. Leon Higginbotham, Jr., Circuit Judge.

Appellant Columbus B. Ricks has brought suit challenging his denial of tenure. The district court dismissed his claims as being untimely. Ricks has challenged the dismissal of two of those claims alleging violations of Title VII of the Civil Rights Act of 1964, as amended,

42 U.S.C. §2000e et seq. and 42 U.S.C. §1981. We agree with Ricks that the dismissal of these claims was improper and we will, therefore, reverse and remand for further proceedings.

I. THE FACTS AND PROCEDURAL HISTORY

Ricks, a black male Liberian, was employed by Delaware State College (the College) from 1970 to 1975 as a Professor of Education and Coordinator of Science Education. In February, 1973, he was denied academic tenure, but was given another one year contract. In February, 1974, the College's Committee on Promotions and Tenure again recommended that Ricks be refused tenure. The College's Board of Trustees met on March 13, 1974 and accepted that recommendation. In April, 1974, Ricks filed a grievance with the Education Policy Committee of the College. In May, 1974,

this committee, after conducting a hearing, determined that the denial of tenure was proper. In June, 1974, the Board of Trustees notified Ricks that he was being given a terminal contract for the school year that ran from September 1, 1974 to June 30, 1975. His employment with the college ceased on the latter date. On April 4, 1975, Ricks filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC). On July 6, 1977, Ricks was sent a right to sue letter by the EEOC. On September 9, 1977, he filed a six-count complaint, alleging, inter alia, that he had been discriminated against on the basis of national origin in violation of Title VII and §1981. The Title VII claim was dismissed for failing to file a charge with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred" as required

by 42 U.S.C. §2000e-5(e). The Section 1981 claim was dismissed as barred by the applicable statute of limitations. The other claims were also dismissed as untimely. On appeal, Ricks challenges only the dismissal of the Title VII and §1981 claims.

II. THE TITLE VII CLAIM

42 U.S.C. §2000e-5(e) requires that "[a] charge under this section be filed within one hundred and eighty days after the alleged unlawful employment practice occurred...." The issue here is: From what date does this 180-day period run? Appellees argue and the court below concluded that it runs from no later than June, 1974 when Ricks was awarded his terminal one year contract. Ricks argues that it runs from June 30, 1975 when his contract actually expired and when he discontinued his services to the college.

In Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3d Cir. 1977), cert.

denied, 99 S. Ct. 87 (1979), this court faced a similar question in the context of a suit under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 et seq. In Bonham, the employee was notified on October 31, 1975, that he would be terminated as of December 31, 1975, but rendered no services after October 31, 1975. Like Title VII, the ADEA requires that a charge be filed "within 180 days after the alleged unlawful practice occurred." 20 U.S.C. §626(d). The court in holding that the 180-day period began to run from the earlier date, made it clear that its decision was based on a two-part test:

> The 180-day period does not begin to run until the employee knows, or as a reasonable person should know, that the employer has made a final decision to terminate him, and the employee ceases to render further

> services to the employer. Until that time he may have reason to believe that his status as an employee has not finally been determined, and should be given an opportunity to resolve any difficulty while he continues to work for the employer. In any event, a terminated employee who is still working should not be required to consult a lawyer or file charges of discrimination against his employer as long as he is still working, even though he has been told of the employer's present intention to terminate him in the future.

569 F.2d at 192 (emphasis supplied).

Given the identical wording of Title VII's and the ADEA's 180-day requirements, and the common humanitarian and remedial purpose of the two statutes, we perceive no reason to interpret the two require-

ments differently in this regard. See Oscar Mayer & Co. v. Evans, 99 S. Ct. 2066 (1979) (Section 14(b) of the ADEA, 29 U.S.C. §633(b), construed as having the same meaning as Section 706(b) of Title VII., 42 U.S.C. §2000e-5(c); Hart v. J. T. Baker Chemical Co., 598 F.2d 829 (3d Cir. 1979).[1]

1. In Hart we specifically recognized that the reasoning of Bonham is, in large measure, applicable in interpreting Title VII. 598 F.2d at 831-32. We referred there to this court's decision in Holliday v. Ketchum, MacLeod & Grove, Inc., 584 F.2d 1221 (3d Cir. 1978) (in banc), which held that the procedural requirements of the ADEA could not, in all respects, be considered analogous to those in Title VII. The Supreme Court, in Oscar Mayer & Co., however, overruled our holding in Holliday and explicitly relied on Title VII in construing the procedural requirements of the ADEA.

The Second Circuit has reached essentially the same conclusion on the basis of similar facts. In Egelston v. State University College at Genesco, 535 F.2d 752 (2d Cir. 1976), the court held that Title VII's time limit runs from when the plaintiff left the university or possibly from when a replacement was hired, not from when the plaintiff was notified that her contract would not be renewed. Also, see Noble v. University of Rochester, 535, F.2d 756 (2d Cir. 1976) (Time runs on a claim of discriminatory promotion from when the person actually promoted assumes his duties, not from when that person assumed the title, but was unable to fully perform his new duties.)

The considerations supporting the results in Bonham and Egelston apply to this case as well. Although the tenure process is portrayed by appellees as a

fixed and unchanging one, even a casual review of the cases in this area reveals instances in which seemingly final decisions have been reconsidered and sometimes reversed. See, e.g., Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975) (notice of termination to co-worker of plaintiff later reversed); Cap v. Lehigh University, 433 F. Supp. 1275 (E.D. Pa. 1977) (denial of tenure reconsidered, but affirmed). Thus in academia as well as in the business community, decisions are often changed and it is not desirable to encourage the initiation of litigation that might thwart any internal processes of conciliation and reconsideration. At this time, when the crowded federal docket is of such great concern to the courts and to the public, courts should be loathe to create rules that unnecessarily add those cases to the docket that could be amicably resolved. Forcing an employee to hire a

lawyer or otherwise commence proceedings against his or her employer is also likely to have the negative side effect of reducing that employee's effectiveness during the balance of his or her term. Working relationships will be injured, if not sundered, and the litigation process will divert attention from the proper fulfillment of job responsibilities.

A final and compelling practical consideration supporting a broad application of the Bonham rule is that it provides a bright line guide both for the courts and for the victims of discrimination.[2]

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2. Other courts have also held that, as in Bonham, where an employee stays on the payroll beyond the time that he ceases his actual services to the employer, the 180-day period runs from the date that services ceased. See International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976); Greene v. Carter Carburetor Co., 532 F.2d 125 (8th Cir. 1976); Payne v. Crane Co., 560 F.2d 198 (5th Cir. 1977) (per curiam; ADEA suit).

Under the appellees' formulation, courts would have to determine when purportedly final decisions are really final and when a reasonable person would really know or have reason to know that a final decision had been made. Besides creating complexity and thereby increasing the cost of litigation, this approach is likely to become a trap for employees who, through attempts at internal resolution of their grievances, would unwittingly lose the opportunity to make a timely filing of their charge. Such an approach would ignore the learning of Love v. Pullman, 404 U.S. 522 (1972), that courts, in construing the procedural requirements of Title VII, must be mindful that it is often laymen, not lawyers, who initiate the process.

Appellees contend that, even if June 30, 1975, the date of Ricks' termi-

nation of his employment, is the appropriate date from which the 180-day period should run, Ricks' filing was untimely because it was made prior to that date. Ricks responds that a continuing violation existed from the time he was initially denied tenure to the time that his contract expired and, therefore, his filing was timely. We agree.

Although employees, who have been informed that they will be terminated, should not be compelled to file charges prior to actually leaving their jobs, neither should they be penalized for doing so. A realistic appraisal of the situation compels the conclusion that, although the termination process is punctuated by several discrete events, it is, in fact, a process. There may be points during the early part of this process when a filing of charges would be premature. By the time the charge was filed here,

however, approximately two months prior to the expiration of the contract, there was clearly no such problem.

Appellees rely on United Air Lines v. Evans, 431 U.S. 553 (1977) and Masco v. United Airlines, 574 F.2d 1127 (3d Cir. 1978), in arguing that a continuing violation theory is not applicable in this context. In both of these cases stewardesses had been actually terminated and then attempted to obtain relief for these terminations by arguing that subsequent actions by the defendant (the refusal of seniority after rehire in Evans; the refusal to rehire in Masco) were part of a continuing violation.

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3. In Evans, four years elapsed between the respondent's initial termination and her subsequent rehire. In Masco, there was approximately a three year period between the appellants' termination and their filing of charges with the EEOC. Thus the time periods in those cases involved years subsequent to the purported illegal termination and the removal of the stewardesses from the payroll.

In this case, however, no continuity is alleged between the actual termination and some subsequent action. Instead it is only alleged that the process of termination itself was a continuing one. Thus Evans and Masco are not in conflict with our decision here.[4]

III. THE SECTION 1981 CLAIM

All parties agree that Delaware's three-year statute of limitations, 10 Del. C. §8106, is applicable to Ricks'

4. Appellees also cite Smith v. American President Lines, Ltd., 571 F.2d 102 (2d Cir. 1978), in which the court rejected the plaintiff's argument that his filing was timely as a result of events that occurred subsequent to the filing. Those subsequent events, which were never made the subject of an amended filing, were, like those in Evans and Masco, separate from the events that formed the basis of the earlier claim. Thus, Smith is not apposite to the question here of whether the expiration of the contract is properly considered a part of the termination process.

§1981 claim. The question is whether the statute runs from the College's June 1974 award of a terminal contract to Ricks or from June 1975 when that contract expired. Our analysis of when Title VII's 180-day period begins to run is also applicable to this question. We conclude, therefore, that the district court erred in dismissing this claim as barred by the statute of limitations.[5]

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5. Appellees urge us to affirm the dismissal of the §1981 claim on the alternative basis that claims of discrimination on the basis of national origin cannot be brought under §1981. The district court noted, but did not decide, this question. We leave it to the district court on remand to make the initial determination on this contention.

IV. CONCLUSION

For the reasons stated above, we will reverse the dismissal of Ricks' claims under Title VII and §1981.[6]

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6. Appellee, Ehsan Helmy, a member of the College's Tenure Committee, argues that, even if the dismissals are reversed as to the other appellees, the dismissal of the claims against her should be affirmed because she was not named in the EEOC complaint and because her only possible participation in the alleged discrimination took place in February, 1974. Neither of these arguments provides a basis for treating Helmy different from the other appellees on this appeal. Even though she was not named in the EEOC complaint, she may be named in the district court action if the parties actually named in the EEOC complaint adequately represented her interests before the EEOC. See, Canavan v. Beneficial Finance Corp., 553 F.2d 860, 865 (3d Cir. 1977). The determination of the adequacy of this representation would require a factual record not yet complied. With respect to the argument that her participation ended in 1974, if it is proved that she took part in a continuing violation, she would be liable despite the fact that her part in this violation occurred more than 180 days before the filing of charge.

Since he has not challenged the dismissal of his other claims, those dismissals will stand.

A True Copy:

Teste :

Clerk of the United States
Court of Appeals for the
Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2565

COLUMBUS B. RICKS,

Appellant

vs.

DELAWARE STATE COLLEGE, et al.

(D. C. CIVIL NO. 77-0342)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

PRESENT: ADAMS, ROSENN and HIGGINBOTHAM,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the -- District of Delaware and was submitted under Third Circuit Rule 12(6) on July 10, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 30, 1978, be, and the same is hereby affirmed in part and reversed in part and the cause is remanded for proceedings consistent with the opinion of this Court.

ATTEST:
Clerk

September 18, 1979

Certified as a true copy and issued in lieu of a formal mandate on October 10, 1979.

Test: Thomas F. Quinn

Clerk, United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

COLUMBUS B. RICKS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	
	*	
DELAWARE STATE	*	
COLLEGE, et al.,	*	Civil Action No. 77-342
	*	
Defendants.	*	

Sheldon N. Sandler, Esquire, of Bader, Dorsey & Kreshtool, Wilmington, Delaware; Judith E. Harris, Esquire, and Dona S. Kahn, Esquire, of Harris and Kahn, Philadelphia, Pennsylvania, Attorneys for Plaintiff

Nicholas H. Rodriguez, Esquire, and William D. Fletcher, Jr., Esquire, of Schmittinger and Rodriguez, Dover, Delaware, Attorneys for Defendants

Robert B. Young, Esquire of Young, and Schwartz, Dover, Delaware, Attorney for Defendant Helmy

O P I N I O N

Wilmington, Delaware

August 30, 1978

STAPLETON, District Judge:

This is an employment discrimination action, brought under the First and Fourteenth Amendments, as well as under 42 U.S.C. §§1981, 1983, 1985(3) and 2000e et seq. There are also two state law claims listed in the complaint over which the plaintiff claims that this Court has pendent jurisdiction.

Plaintiff is a black male Liberian who was employed by the Delaware State College ("the College") from 1970 to 1975. The defendants are Delaware State College, its Board of Trustees, President, Dean, the Chairman of the Education Department

there, and the faculty members of its Committee on Promotion and Tenure. The complaint alleges employment discrimination on the basis of plaintiff's national origin.

The complaint alleges that plaintiff was hired as a professor of Education and Coordinator of Science Education at Delaware State College in 1970. In 1973 and 1974, he was denied tenure. In 1974, he was awarded a terminal contract which expired on June 30, 1975.[7] In addition,

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[7]The complaint alleges that plaintiff was subsequently discharged on June 1, 1975. At oral argument, plaintiff's counsel acknowledged that his employment terminated with the expiration of his terminal contract on June 30, 1975.

plaintiff alleges that he was harrassed and abused by defendants Delaware State College, McLaughlin and Caldwell during the years 1970 to 1975. On April 4, 1975, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). On July 6, 1977, he received a right to sue letter.

All of the defendants have moved for dismissal of all of the Counts of the complaint pursuant to Rule 12(b) and (c) of the Federal Rules of Civil Procedure. The counts will be discussed separately.

COUNT I

In Count I of his complaint, plaintiff claims that the actions of the defendants violated his First Amendment rights, as incorporated by the Fourteenth Amendment, by punishing him for exercising his rights of free speech and association. Defendants have moved to dismiss Count I on the ground that it is barred by the

applicable Delaware statute of limitations, 10 Del. C. §8119. In his answering brief, plaintiff has conceded that Count I is barred by that statute. Accordingly, Count I of the complaint will be dismissed.

COUNT II

In Count II of his complaint, plaintiff has alleged that the defendants discriminated against him in his employment, due to his national origin, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., as well as under 42 U.S.C. §§1981 and 1983. Defendants have moved to dismiss the Title VII claim on the grounds of lack of jurisdiction and failure to meet the Title VII statute of limitations. Defendants have moved to dismiss the Section 1981 and Section 1983 claims on the ground that they are barred by the

applicable statute of limitations. They also contend that the Section 1981 claim fails to state a cognizable claim for relief.

1. The Title VII Claim.

Defendants initially moved to dismiss the Title VII claim on the ground that the plaintiff had not complied with 42 U.S.C. §2000e-5(c), which requires that before a charge of discrimination may be filed with the EEOC, if there is "a State or local law prohibiting the unlawful employment practice alleged and establishing . . . a local authority" to act upon the complaint, the aggrieved party must commence a proceeding under state or local law and give that proceeding a sixty day lead period. However, Plaintiff attached to his answering brief an affidavit and exhibits which indicate that he filed a charge of discrimination with the Delaware Department of Labor on April 11, 1975,

pursuant to 19 Del. C. §710, et seq., and that the Delaware Department of Labor waived jurisdiction over the charge to the EEOC. Having been confronted with the affidavit and exhibits, the defendants conceded in their reply briefs, that for purposes of this motion only, it may be assumed that plaintiff has complied with 42 U.S.C §2000e-5(c).

Defendants argue, however, that plaintiff is time barred from pursuing his Title VII claim by the 180 day provision of 42 U.S.C. §2000e-5(c). That section provides that charges of discrimination shall be filed with the EEOC[8] within 180

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[8]The charge of discrimination filed by the plaintiff with the EEOC on April 4, 1975 listed only the College and its Board of Trustees as respondents. Under 42 U.S.C. §2000e-5(f)(1), only those respondents can be defendants to a Title VII action. Plaintiff does not contest this, although he argues that the individual members of the Board of Trustees may be defendants. Due to my disposition of the statute of limitations question, I need not address that issue.

days after the occurrence of the alleged unlawful employment practice. See United Air Lines v. Evans, 431 U.S. 553 (1977).

Defendants argue that since plaintiff's tenure was denied more than 180 days before the plaintiff had filed his charge of discrimination with the EEOC, he is barred from any Title VII relief by 42 U.S.C. §2000e-5(e). Plaintiff counters, however, with the argument that (1) the last unlawful employment practice was his termination on June 30, 1975, and (2) he has alleged a continuing pattern of discrimintion, and that, therefore, his Title VII claim is not time barred.

Even if there is a continuing pattern of discrimination alleged, the crucial issue which remains is whether there is an allegation of any unlawful employment practice within the 180 day period pre-

ceding April 4, 1975,[9] the date on which the plaintiff filed his charge of discrimination with the EEOC. Unless an EEOC charge was filed within 180 days after some unlawful employment practice, there is no "present violation" for Title VII purposes. As the Supreme Court said in United Air Lines v. Evans, supra, at 558: "But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists." See also Masco v. United Airlines, 574 F.2d 1127 (3rd Cir. 1978).

At oral argument, plaintiff's counsel made it clear that the only acts upon which the plaintiff relies to bring his case within the statutory period are those relating to the denial of tenure and the termination of his employment.

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[9] 180 days before April 4, 1975 is October 7, 1974.

Accordingly, the relevant inquiry is whether there are legally relevant acts connected with that denial and termination which occurred after October 7, 1974.

The complaint alleges the following facts and dates. The 1974 Committee on Promotion and Tenure denied the plaintiff tenure on February 21, 1974 and recommended the award of a terminal contract to the plaintiff. In March of 1974, plaintiff petitioned the Board of Trustees for a hearing on his denial of tenure. In April of 1974, the Board of Trustees confirmed the denial of tenure. On June 26, 1974, the Board of Trustees notified the plaintiff of his terminal contract, which would conclude on June 30, 1975. On September 12, 1974, the Board of Trustees notified the plaintiff that it would not reverse the February 21, 1974 denial of tenure. On January 15, 1975,

the President of the College reconfirmed the decision of the Board. Plaintiff was terminated from the College on June 30, 1975.

Plaintiff contends that the critical date is not when he was denied tenure and awarded a terminal contract, but rather the date upon which his services were actually terminated, June 30, 1975. Plaintiff's theory is that the Board of Trustees still has the power to reverse its decision and grant the plaintiff tenure until June 30, 1975, and that, therefore, the final unlawful employment practice did not occur until that date. I cannot agree.

I conclude that the alleged violation occurred when the Board of Trustees denied the plaintiff tenure and awarded him a terminal contract. First, the complaint alleges that the Board of Trustees is responsible for the "management, control

and conduct of the instructional, administrative and financial affairs" of the College. Therefore, it is the actions of that Board which must be looked to. Second, the allegedly discriminatory acts of the Board were the denial of tenure and the award of the terminal contract. The consequence of the Board's action, the actual termination on June 30, 1975, cannot be considered a separate action. Plaintiff's argument, that the statute of limitations was tolled while the Board was still able to reverse its position, must fail for the reasons set forth in Meyers v. Pennypack Woods Home Ownership Assn., 559 F.2d 894 (3rd Cir. 1977). In that case, which arose under the Fair Housing Act, the Court held that the defendant's refusal to reverse its decision not to put the plaintiff on a housing list did not "breathe life" into a claim otherwise barred by the 180 day provision of that

Act. 559 F.2d at 899. As the Court there pointed out, allowing such a refusal to change one's position to be considered to be either part of a continuing violation or an independent violation would eviscerate the statute of limitations set out by Congress.

As plaintiff's own actions illustrate, the expiration of his terminal contract on June 30, 1975 simply added nothing to his claim. Although plaintiff contends that the crucial unlawful employment practice did not occur until that date, he had filed his charge of discrimination with the EEOC on April 4, 1975. The fact is that plaintiff could have filed his charge of discrimination when the Board of Trustees denied him tenure and awarded him a terminal contract in the spring of 1974 and his case would have been no different then the one which was filed at any subsequent time.

In summary, the complaint affirmatively alleges that the Board of Trustees had decided to deny plaintiff tenure and to award him a terminal contract, and had communicated this to the plaintiff by June 26, 1974. Since the plaintiff did not file a charge of discrimination with the EEOC within 180 days after that, his Title VII claim is barred by 42 U.S.C. §2000e-5(e). The Title VII claim of Count II will be dismissed.

2. The Section 1981 and 1983 Claims.

Plaintiff maintains that even if his Title VII action is barred by the statute of limitations, that does not affect his claims under the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§1981 and 1983. However, the defendants argue that these claims are also barred by the applicable statutes of limitations.

There is no statute of limitations set forth by Congress for actions brought pursuant to Section 1981 or Section 1983. It is clear, however, that in such actions, the applicable period of limitations is that which the state court would apply if the action were brought in that forum under state law. Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (Section 1981); Jennings v. Shuman, 567 F.2d 1213 (3rd Cir. 1977) (Section 1983). It is also well established in this district that civil rights actions brought under Section 1981 or 1983, based upon alleged discrimination in employment, are governed by the three year statute of limitations found in 10 Del. C. §8106. Scott v. University of Delaware, _____ F. Supp. _____ (D. Del. August 16, 1978); Guilday v. Department of Justice, 451 F. Supp. 717 (D. Del. 1978); Marshall v. Electric Hose & Rubber Co., 68 F.R.D. 287

(D. Del. 1975) (Section 1981); Trivits v. Wilmington Institute, 383 F. Supp. 457 (D. Del. 1974); Gordenstein v. University of Delaware, 381 F. Supp. 718 (D. Del. 1974) (Section 1983).

Plaintiff's complaint in this action was filed on September 9, 1977. Under the three year limitation period of 10 Del. C. §8106, any claims arising out of allegedly discriminatory acts occurring prior to September 9, 1974 are barred.

As noted above, the only date upon which the plaintiff relies to toll the statute of limitations is that relating to his denial of tenure and termination. As with the Title VII claim, the alleged violation had occurred by June 26, 1974, when the Board of Trustees notified the plaintiff of his terminal contract. That the terminal contract itself did not expire until a year later is of no legal significance in determining when the

statute of limitations begins to run, the relevant question is when the plaintiff could have sued. See, e.g., Hood v. McConemy, 53 F.R.D. 435 (D. Del. 1971). Plaintiff has pointed to no reasons why he could not have brought a lawsuit under Sections 1981 and 1983 as of June 26, 1974, based upon the same allegedly discriminatory actions now complained of. When he did not file an action within three years of that date, any such actions was barred by the provisions of 10 Del. C. §8106.

The claims of Count II brought under Sections 1981 and 1983 will also be dismissed.[10]

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[10] This action alleges only discrimination based upon national origin. Defendants also argue that such a claim does not state a cause of action under Section 1981, which has been interpreted to protect against only racial discrimination. See, e.g., Budinsky v. Corning Glass Works, 425 F. Supp. 786 (W.D. Pa. 1977); Jones v. United Gas Improvement Corp., 68 F.R.D. 1 (E.D. Pa. 1975).

COUNT III

In Count III of his complaint, plaintiff alleges that he was deprived by the defendants of property or liberty, without due process of law, in violation of the Fourteenth Amendment. Defendants have moved to dismiss this Count on the grounds that (1) plaintiff has failed to state a cognizable property or liberty interest protected by due process, and (2) the claim is barred by the applicable statute of limitations.

It is clear that this count also applies to the denial of tenure to the plaintiff. Plaintiff claims that the expectation of continued employment can be inferred from the current record and that, accordingly, the claim cannot be dismissed under Gordenstein v. University of Delaware, supra. I need not decide whether it can be inferred that the plaintiff had a

property or liberty interest in the expectation of continued employment, for I conclude that even if such an interest did exist, Count III is barred by the applicable statute of limitations.

As I found in Gordenstein, the applicable statute of limitations in this type of action is the three year period of 10 Del. C. §8106. Since the complaint alleges that the tenure decision had been made by April of 1974, and the complaint was not filed until September 9, 1977, Count III is barred by the three year limitation period.

COUNT IV

In Count IV of his complaint, plaintiff alleges that defendants Mishoe, Caldwell, McLaughlin, Henderson, the Board of Trustees, and the 1973 and 1974 Committees on Promotion and Tenure conspired against the plaintiff to deprive him of his civil rights, in violation of

42 U.S.C. §1985(3). Defendants have moved to dismiss this count on the grounds that (1) the plaintiff has not identified two entities capable of conspiring with one another, and (2) the claim is barred by the applicable statute of limitations.

Because I conclude that Count IV is also time barred, I need not decide whether the complaint alleges facts from which the existence of two separate and independent entities capable of conspiring with one another might be inferred. In Blake v. Town of Delaware City, 441 F. Supp. 1189, 1200 (D. Del. 1977), the Court stated, quoting Freedman v. Beneficial Corp., 406 F. Supp. 917 924 (D. Del. 1975):

> [T]he statute of limitations in a civil conspiracy runs from the time of the overt act which is alleged to have caused the damages complained of even though damages continue to flow indefinitely as a result of the act.

Although plaintiff's employment at Delaware State College was not actually terminated until June of 1975, it is clear that the overt act causing the damages was the denial of tenure. This denial was completed and the plaintiff was so notified by April of 1974. Since the complaint was not filed until September of 1977, Count IV is time barred by the three year provision of 10 Del. C. §8106. Accordingly, Count IV will be dismissed.

COUNT V

Count V is a state law claim alleging that the defendants "repeatedly wilfully and maliciously" breached their employment contracts with the plaintiff. It appears that the plaintiff is not claiming that he was terminated in the middle of a contract period, but rather that he should have been granted another contract when the last one expired, and that he failed to receive all the benefits due him under the contracts he did have.

The Delaware courts have held that the three year provision of 10 Del. C. §8106 covers actions for breach of employment contracts. Goldman v. Braunstein's, Inc., 240 A.2d 577 (Del. Sup. Ct. 1968). Goldman indicates, and this Court had held, however, that whereas an action based on a breach of contract where services have not yet been performed (i.e. wrongful termination) is controlled by Section 8106, see also Mitchell v. E. I. duPont de Nemours & Co., 310 A.2d 641 (Del. Sup. Ct. 1973), an action for damages for failure to compensate for services which have been performed is controlled by 10 Del. C. §8111, which has a one year provision. Wilmington Housing Authority v. Rocky Marciano Construction Co., 407 F. Supp. 228 (D. Del. 1976). See also Brown v. Colonial Chevrolet Co., 249 A.2d 439 (Del. Super. Ct. 1968).

Insofar as plaintiff is claiming additional compensation which he alleges he was not paid from 1970 to 1975, his claim is barred by Section 8111. Insofar as plaintiff claims that the breach of contract complained of in Count V is for improper termination, his claim is also time barred. Tenure was denied by the Board of Trustees in April of 1974, and plaintiff was notified of his terminal contract on June 26, 1974. If the contract was breached, it was breached as of those dates, and the three year provision of Section 8106 bars the action. See e.g., Hood v. McConemy, 53 F.R.D. 435 (D. Del. 1971). That the defendants could subsequently have changed their minds does not alter the date of the alleged breach.

Accordingly, Count V will be dismissed.

COUNT VI

Count VI is a claim for emotional and mental distress. Defendants have moved to dismiss this count on the grounds that it is time barred by 10 Del. C. §8119. Plaintiff has conceded in his brief that Count VI should be dismissed. Therefore, Count VI will be dismissed.

SUMMARY

The parties have agreed that Counts I and VI must be dismissed under the applicable statutes of limitations. I have concluded that Counts II, III, IV and V are also time barred. Accordingly, all counts of the plaintiff's complaint will be dismissed.[11]

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[11] Defendant Helmy has filed a counterclaim against the plaintiff for malicious prosecution and abuse of process. This is a claim arising under State law. Given the disposition of the federal claims, the Court will not exercise its pendent jurisdiction over the counterclaim. The counterclaim will, therefore, be dismissed without prejudice.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

COLUMBUS B. RICKS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	C.A. No. 77-342
	*	
DELAWARE STATE COLLEGE, et al.,	*	
	*	
Defendants.	*	

ORDER

THIS 30th day of August, 1978, for the reasons stated in the Court's Opinion of this date,

NOW, THEREFORE, IT IS ORDERED that:

1. Defendants' motion to dismiss all counts of the complaint is granted.

2. Defendant Helmy's counterclaim is dismissed without prejudice.

/s/ Walter K. Stapleton
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

COLUMBUS B. RICKS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. 77-342
	*	
DELAWARE STATE COLLEGE, et al.,	*	
	*	
Defendants.	*	

Sheldon N. Sandler, Esquire, of Bader, Dorsey & Kreshtool, Wilmington, Delaware; Judity E. Harris, Esquire, and Dona S. Kahn, Esquire, of Harris and Kahn, Philadelphia, Pennsylvania, Attorneys for Plaintiff

Nicholas H. Rodriguez, Esquire, and William D. Fletcher, Jr., Esquire, of Schmittinger and Rodriguez, Dover, Delaware, Attorneys for Defendants

Robert B. Young, Esquire, of Young and Schwartz, Dover, Delaware, Attorney for Defendant Helmy

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MEMORANDUM OPINION

Wilmington, Delaware

October 16, 1978

STAPLETON, District Judge:

On August 30, 1978, this Court issued an Opinion and Order dismissing all counts of the plaintiff's employment discrimination action on limitations grounds. Plaintiff has now moved for reconsideration of the Court's decision, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In support of his motion, plaintiff has cited Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3d Cir. 1978), a recent Third Circuit case not previously brought to the Court's attention. For the reasons which follow, I do not believe that Bonham is controlling in this case, and will, therefore, deny the plaintiff's motion for reconsideration.

I concluded in my Opinion of August 30, 1978, that plaintiff was barred

by the 180 day provision of 42 U.S.C. §2000e-5(e), because there was no allegation of any unlawful employment practice within 180 days before April 4, 1975, the date upon which the plaintiff filed his charge of discrimination with the EEOC. United Air Lines v. Evans, 431 U.S. 553 (1977). In particular, I found that plaintiff's claims regarding the decisions to deny his tenure and to grant him a one year terminal contract accrued in the spring of 1974 when the Board of Trustees of the college affirmed those decisions and plaintiff was so advised. Plaintiff argues, however, that since his terminal contract did not actually expire until June 30, 1975, under Bonham, the 180 day period did not begin to run until that date.

The Bonham decision involves the requirements of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621,

et seq., that an aggrieved party must give 60 days notice to the Secretary of Labor before commencing an action against his or her employer in court and that such notice must come within 180 days "after the alleged unlawful practice occurred." 29 U.S.C. §626(d)(1). Bonham was a non-contract employee who claimed that his employment was terminated as a result of age discrimination. The Court of Appeals agreed with the District Court holding that the alleged violation occurred, for purposes of applying the 180 day rule, when Bonham was relieved of his job responsibilities and was told that his employment was terminated, despite the fact that his salary and benefits continued for a period of two months thereafter. The Court of Appeals nevertheless reversed the entry of summary judgment for the defendant, finding material disputes of fact as to

whether there were circumstances which called for a tolling of the running of the statutory period, i.e., the employer's breach of his statutory duty to post notice of the existence of the ADEA, 29 U.S.C. §627, and the employer's encouragement of Bonham to believe that he might be placed elsewhere in the company.

This case, however, involves nothing analogous to the circumstances which the Court thought might toll the statutory period in Bonham. Plaintiff's argument initially and again on the motion to reargue is not that he was encouraged to think that the decision to deny him tenure would be revoked or even that there were appeal procedures which remained unexhausted within 180 days of the filing of his charge. Rather, his argument is that the 180 day period did not begin to run until his job responsibilities ceased upon the expiration of his terminal contract in June of 1975.

I conclude plaintiff reads Bonham more broadly than is justified and that his argument is untenable. Bonham does not hold that a termination of employment, for purposes of applying the 180 day period, can never occur without the employee physically leaving the employer's premises, and, even if it did, it would be of doubtful relevance in a case where the alleged violation is a failure to offer a faculty contract without term. The simple fact of the matter is that plaintiff's claim ripened long before June 30, 1975, and that the option of filing a charge was open to him for many months before that date. Indeed, it is somewhat anomalous for him to suggest otherwise since he in fact filed his claim with the EEOC on April 4, 1975.

Thus, I remain of the view that the 180 day period began to run in the spring of 1974 when the Board of Trustees af-

firmed the decisions to deny tenure and to grant a terminal contract.[12] Accordingly, the motion for reconsideration will be denied.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

COLUMBUS B. RICKS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No.77-342
	*	
DELAWARE STATE COLLEGE, et al.,	*	
	*	
	*	
Defendants.	*	

O R D E R

---

[12] I remain of the same view with respect to the commencement of the runing of the statutory period on plaintiff's other claims.

THIS 16th day of October, 1978, for the reasons stated in the Court's Memorandum Opinion of this date,

Now, therefore, IT IS ORDERED that plaintiff's motion for reconsideration of the Court's decision of August 30, 1978 is denied.

/s/ Walter K. Stapleton
United States District Judge